No. 09-18-00359-CV

No. 09-18-00392-CV

IN THE COURT OF APPEALS
FOR THE NINTH DISTRICT OF TEXAS
BEAUMONT, TEXAS

OXBOW CALCINING LLC
Appellant,

v.

PORT ARTHUR STEAM ENERGY, L.P.
Appellee

On Appeal from the 172nd Judicial District Court, Jefferson County, Texas
Cause No. E-201894
The Honorable Donald J. Floyd presiding

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STATEMENT OF THE CASE

Appellee, Port Arthur Steam Energy, L.P. ("PASE"), disagrees with certain characterizations of the Nature of the Case and the Course of Proceedings in the Statement of the Case authored by Appellant Oxbow Calcining LLC ("Oxbow") and desires to address those mischaracterizations.

Oxbow filed an accelerated Interlocutory Appeal from (1) an Order Denying Oxbow's Motion to Compel Arbitration and (2) an Order Granting Post-Judgment Turnover Relief (the "Turnover Order") that entered a post-judgment injunction to assist PASE, a judgment creditor, with collecting its Final Judgment against Oxbow. The Turnover Order also appointed a receiver to monitor Oxbow's compliance with the Order and to make certain reports to the court relating to Oxbow's compliance.

Contrary to Oxbow's description of the Course of Proceedings, PASE did not "sue" Oxbow for "purportedly violating the parties' 2005 Heat Energy Agreement ("HEA") or to recoup "contractual credits under the HEA." PASE sought relief under Section 31.002(a) Tex. Civ. Prac. & Rem. Code Ann. (the "Turnover Statute") by filing a Petition and Application for Post-Judgment Enforcement Orders (the "Application") in Jefferson County. Texas. PASE's Application was assigned to the Honorable Donald J. Floyd in the 172nd District Court in Jefferson County. PASE was not "claiming to be a judgment creditor," but is, in fact, a judgment creditor who

sought orders from the District Court to assist it with collecting the Final Judgment that it obtained against Oxbow on January 8, 2015 (the "Final Judgment" or "Judgment") which, after appeal, confirmed an Arbitration Award entered by a three person panel in favor of PASE on December 9, 2011. In the Award, incorporated into the Judgment, PASE received damages of $3,409,781.57 against Oxbow, with interest, none of which has been recovered by PASE.

The Turnover Order does not "mandate how Oxbow operates its plant," but, instead, enjoins Oxbow from diverting or limiting waste heat that Oxbow delivers to PASE's steam generation plant when Oxbow operates its connected kilns so that PASE can collect the Judgment in the manner provided therein. A receiver was not appointed in the Turnover Order "to monitor Oxbow's operations" generally, but was appointed "to ensure that Oxbow Calcining LLC is complying with this Order." For these reasons, PASE objects to certain "facts" set forth in Oxbow's Statement of the Case and clarifies the misstatements as set forth herein.

STATEMENT REGARDING ORAL ARGUMENT

PASE agrees with Oxbow's Request for Oral Argument based upon the procedural and substantive complexities presented.

ISSUES PRESENTED

ISSUE ONE

Did the District Court err by not compelling a second arbitration to allow Oxbow to dispute the mechanism by which PASE would be permitted to collect its Judgment?

ISSUE TWO

Did the District Court err by not ruling that PASE's Application for Turnover Statute Orders was a new "dispute" requiring a second arbitration

ISSUE THREE

Did the District Court err by refusing to compel PASE to go to a second arbitration to enforce the Judgment that it obtained which confirmed the Arbitration Award and provided, "This Order and Final Judgment renders the Award (the Arbitration Award) incorporated herewith enforceable in the same manner as any other judgment or decree of the Court?"

ISSUE FOUR

Did the District Court err by enforcing the Texas Turnover Statute as written when the Court entered an Order Granting Post-Judgment Turnover Relief that appointed a receiver to monitor compliance with injunctive relief granted to assist PASE with collecting its Judgment?

ISSUE FIVE

Did the District Court err in determining that the Court had jurisdiction to grant the Turnover Order when the Turnover Statute allows a court of competent jurisdiction to aid a judgment creditor in the enforcement of its judgment?

PASE'S RESPONSE TO OXBOW'S "INTRODUCTION"

Oxbow's "introduction" is nothing more than an invitation for this Court to enter Oxbow's world where a 2015 Judgment (now worth more than $5 million) counts for nothing but a mere pretext to avoid a second arbitration. PASE disputes every sentence in Oxbow's Introduction which does not accurately describe the post-Judgment relief actually sought and obtained by PASE under the Turnover Statute.

Oxbow argues that the attempt by PASE to collect its Judgment "is not the reality." Oxbow ignores that the Judgment expressly states that it can be enforced in the same manner as any other Texas judgment. PASE's Judgment anticipates the use of writs and other judgment enforcement mechanisms, including a turnover order. The reality is that PASE has an unsatisfied Judgment and the property that is the subject of the Turnover Order is not exempt.

Without calling a single witness to testify, Oxbow's counsel engaged in a strategy of misleading arguments and delay tactics, in the District Court and in this Court of Appeals, to try to prevent PASE from recovering its Judgment. Oxbow's strategy is to force PASE out of business so that PASE can never recover its Judgment against Oxbow in the manner contemplated in that Judgment.[1]

[1] Oxbow shut PASE down on June 25, 2018. PASE is losing $723,456.00 per month net of operating expenses. 2 SUPP RR 30. PASE is spending $12,000.00 per day in labor and other expenses for a non-operational plant to try to remain viable to implement the Turnover Order. 2

In its Introduction and throughout its Brief, Oxbow mischaracterizes the evidence and the relief requested and received by PASE[2]. Oxbow even resorts several times to citing "facts" from affidavits not in evidence from "witnesses," including Oxbow's own counsel, who did not testify. The Honorable Donald F. Floyd saw through Oxbow's strategy when he entered the Order Granting Post-Judgment Turnover Relief (the "Turnover Order").

When considering Oxbow's Introduction, this Court should note that Oxbow completely ignores or only makes cursory mention of the fact that: (1) PASE has a Judgment valued at $5 million dollars that Oxbow has prevented PASE from recovering; (2) Oxbow's Application only requested post-Judgment relief under the Turnover Statute to allow it to recover its Judgment in the manner prescribed therein; (3) PASE did not assert any new claims or causes of action, or seek to recover new damages, in the post-Judgment proceeding; and (4) the relief granted by Judge Floyd in the Turnover Order will assist PASE with collecting its Judgment in the manner intended in that Judgment, nothing more.

SUPP RR 37. The plant is deteriorating and PASE is on the verge of losing all necessary employees and contracts necessary for it to remain in business. 2 SUPP RR 37-42. If PASE is forced out of business, it will not be possible for PASE to collect its Judgment through the relief granted in the Turnover Order and PASE's $62 million plant will become essentially worthless. 2 RR 116.

[2] The word limitations to this Brief prevents PASE from addressing all of the inaccuracies set forth in Oxbow's Introduction and Statement of Facts; however, PASE addresses some of the more significant mischaracterizations in Response Point III.

Oxbow's arguments are not supported by the facts or law, and Oxbow's tactics should not be rewarded. This Honorable Court should affirm the Turnover Order in all respects.

STATEMENT OF FACTS

I. Overview of Oxbow's calcining plant, PASE'S steam plant, and the Heat Energy Agreement.

PASE owns and operates a steam plant that is connected to Oxbow's petroleum coke calcining plant in Port Arthur, Texas. CR 9. Pursuant to a Heat Energy Agreement ("HEA") executed in 2005 between PASE and Oxbow's predecessor-in-interest, Great Lakes Carbon, Oxbow supplies waste heat (sometimes referred to as flue gas energy) to PASE that PASE uses to generate and deliver steam which is sold to an end user, Valero Port Arthur Refinery. Oxbow operates four kilns that it identifies as Kiln Nos. 2, 3, 4, and 5. Kiln Nos. 3, 4, and 5 are connected to PASE's steam plant and deliver waste heat to PASE's Boiler Nos. 3, 4, and 5. CR 10. PASE's plant is a "green" energy facility that has no adverse impact on the environment. CR 10.

Producing steam cools Oxbow's waste heat from 2,000 degrees to approximately 400 degrees. The waste heat is discharged through three "cold stacks" at the facility. Although the HEA requires Oxbow to use prompt, substantial and persistent efforts as commercially reasonable to maximize the production and delivery of waste heat to PASE (CR 18, 38; Exh. 9 §5.1), if Oxbow desires to circumvent PASE and disregard its obligations under the HEA, Oxbow can release

its waste heat directly from its kilns through "hot stacks" and bypass PASE's steam plant altogether. In other words, Oxbow has the ability to manipulate its dampers to curtail or completely shut off waste heat to PASE. CR 10.

While Oxbow's duties under the HEA to maximize the delivery of waste heat to PASE are subject to a "Commercially Reasonable" condition set forth in Section 5.1 of the HEA and Section 3.3 requires both parties to operate and maintain their respective facilities in accordance with "Prudent Operating Practice" to comply with all applicable Laws and Permits, Oxbow's obligation to control pollution at these interrelated plants is unconditional. Oxbow's duty to control pollution is not subject to "Commercially Reasonable" or "Prudent Operating Practice" considerations or limitations. CR 18, 24, 37; Exh. 9 §4.2. Section 4.2 of the HEA provides that "[Oxbow] shall be solely responsible for all calcining flue gases emanating from the operation of its Kiln Systems 3, 4, and 5 up to the Flue Gas Points of Delivery for hot flue gas, and then beyond the Flue Gas Points of Delivery for cold flue gas. CR Exh. 9 §4.2.

II. PASE prevailed on its Counterclaim in arbitration and the Award was confirmed in a Judgment; Oxbow has sole duty to control pollution.

Despite the clear language of the HEA, Oxbow sued PASE in 2010 in arbitration to try to make PASE pay approximately $12 million for a "Baghouse Pollution Control System" that Oxbow purchased between 2010 and 2011 to control pollution from Oxbow's calcining processes. 5 RR Exh. 11, p. 301. Oxbow lost that claim. The Arbitration Panel ruled that Oxbow was solely responsible for pollution control. 5 RR Exh. 11, p. 303, 306-07.

In relevant part, the Award states, "Additionally, we find that Oxbow, which is contractually and legally responsible for complying with its air permits, bears the risk of installing and maintaining pollution control equipment that will ensure the Plant's operation in accordance with Oxbow's air permits and any other applicable environmental laws." 5 RR Exh. 11, p. 303. In its Award, the Panel defined the "Plant" as constituting *both* the Steam Plant and the "Calciner" (the defined term for Oxbow's coke calcining plant). 5 RR Exh. 11, p. 299. Oxbow's duties and obligations relating to pollution control under the HEA were fully litigated and determined in the Judgment. The Panel declared "the Heat Agreement does not obligate PASE…(ii) to install or maintain additional pollution control equipment for the benefit of Oxbow now or in the future; or (iii) to ensure that any emissions from the hot stacks or the cold stacks comply with any applicable environmental laws or permits now or in the future. 5 RR Exh. 11, p. 303.

Oxbow also claimed in arbitration that an MgO/multiclone system that PASE installed during the steam plant refurbishment failed to properly control pollution. 5 RR Exh. 11, p. 301. The Panel decided otherwise. 5 RR Exh. 11, p. 303. On page 5 of the Award, the Panel wrote:

> The preponderance of the evidence showed that the MgO/multiclone system performed its intended purpose and removed millions of pounds of particulate... We concluded from Jim McKenzie's testimony that [Oxbow] gave up on inserting a specific standard for the amount of pollution control to be achieved; in exchange for getting the control right to shut everything down if there was a pollution problem. 5 RR Exh. 11, p. 303.

The Panel also ruled in favor of PASE on PASE's counterclaim. The Panel found "that Oxbow has breached Section 5.1 of the Heat Agreement, which requires it to 'use Commercially Reasonable Efforts to maximize the production and delivery of Flue Gas Energy' to PASE." 5 RR Exh. 11, p. 305. The Panel also found that Oxbow "breached Section 3.3 of the Heat Agreement, which requires it to operate and maintain its facility 'in accordance with Prudent Operating Practice to comply with all applicable Laws and Permits, and within the design parameters and limits of the applicable materials, equipment and construction.'" 5 RR Exh. 11, p. 305.

The arbitration occurred in August of 2011 and PASE was awarded $4,515,056.00 in direct damages for lost revenue caused by Oxbow's breaches of the HEA. 5 RR Exh. 11, p. 306. An offset was applied for the cost of repairing the

cold stacks which the Panel determined were not properly installed initially and for PASE's ten percent share of certain ad valorem taxes. 5 RR Exh. 11, p. 307.

Commenting on the evidence that supported PASE's counterclaim for breach of the HEA, the Panel wrote:

> The evidence, including evidence from Oxbow's current and former employees and consultants, establishes that Oxbow employed substandard operational and maintenance practices that fail to conform to the requisite performance standards of the Heat Agreement. Specifically, Oxbow routinely has had uncontrolled openings in its pyroscrubber, inadequate instrumentation inside the pyroscrubber, leakage in damper seals, improper insulation in the pyroscrubber, and improper fan controls. The evidence of poor operations and maintenance was not only credible, it was overwhelming. Moreover, the evidence establishes that Oxbow fostered a culture that repeatedly interrupted or reduced delivery of maximum Flue Gas Energy to PASE. All of these factors contributed to PASE's decreased steam revenue. 5 RR Exh. 11, p. 305, 06.

The Panel then made findings regarding the lack of credibility of Oxbow's position in arbitration stating:

> Oxbow contends that it would be illogical for Oxbow act in such a way as to reduce its own revenue stream. PASE argued that Oxbow had a long term plan to acquire PASE's assets, and take all of the revenue for itself. PASE argues that Oxbow was willing to suffer some short term pain for long term gain. PASE presented some credible evidence to support this. 5 RR Exh. 11, p. 306.

The Panel awarded net damages to PASE of $3,409,781.57, plus interest. 5 RR Exh. 11, p. 307. The Arbitration Award states "This is not a cash award requiring

Oxbow to write PASE a check. It has to be handled in accordance with the specific provisions of the Heat Agreement regarding the heat bank as an offset." 5 RR Exh. 11, p. 307. Thus, PASE was to collect its Judgment from continued operation of PASE's steam plant which is connected to, and completely reliant upon, receipt of waste heat from Oxbow. 5 RR Exh. 11, p. 307. The Heat Bank/Heat Payment formula referenced in the Award is governed by Section 6.1 of the HEA. 5 RR Exh. 9, p. 40.

The Arbitration Award was signed on December 11, 2011. After appeal, a Judgment was confirmed and entered in favor of PASE on January 8, 2015. 5 RR Exh. 11, p. 297. The Order and Judgment confirming the Award provide that the Judgment is "enforceable in the same manner as any other judgment or decree." 5 RR Exh. 11, p. 297.

III. PASE'S Turnover Statute Application and the Court's Turnover Order; Oxbow's pollution control duties were established in the Award and Judgment.

After the Judgment, rather than operate to maximize the delivery of waste heat to PASE so that PASE could satisfy its Judgment, Oxbow began intermittently diverting waste heat from Kiln Nos. 3, 4, and 5 directly into the atmosphere through

Oxbow's hot stacks.[3] 2 RR 143-48. In 2017 and 2018, Oxbow began shutting down all waste heat delivery to PASE Boiler Nos. 3 and 4. 2 RR 143-48. Having collected nothing on its Judgment, PASE filed its Petition and Application for Post-Judgment Enforcement Orders (the "Application") asking the District Court to enjoin Oxbow from diverting waste heat through its hot stacks so that PASE could recover its Judgment in the manner contemplated under the Judgment by offsetting the 30% steam revenues otherwise payable to Oxbow through a Heat Bank formula provided in the HEA. 3 RR 117; 5 RR Exh. 9, p. 308. Shortly after learning of PASE's Application, Oxbow notified PASE that it was terminating delivery of waste heat to PASE's only boiler still receiving waste heat, Boiler No. 5, which forced PASE to completely shut down on June 25, 2018. 2 RR 152-53.

Following this Court's denial of Oxbow's Petition for Writ of Mandamus, Judge Floyd considered Oxbow's Motion to Transfer Venue, Motion to Compel Arbitration, and, finally, PASE's Post-Judgment Application on August 21, 28, and

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[3] Not coincidentally, Oxbow's actions coincided with a three year monitoring program implemented by the Texas Commission on Environmental Quality ("TCEQ") that began in 2017 whereby the TCEQ is monitoring SO_2 emissions near Oxbow's plant to determine whether Jefferson County is in "attainment" or "non-attainment" under the One Hour National Ambient Air Quality Standard ("NAAQS") for SO_2 in the atmosphere. The evidence was uncontroverted that the SO_2 monitor was placed based upon discharge of waste heat from Oxbow's "cold stacks" after the waste heat passed through PASE's steam generation facility. 2 RR 148-51; 3 RR 42-45. The evidence was also uncontroverted that Oxbow was using real time wind direction data to close its dampers to deliver waste heat to PASE, discharging that waste heat, instead, through Oxbow's hot stacks into the atmosphere to avoid the monitor. 3 RR 165-172. Though not dispositive to Judge Floyd's Order, the Offer of Proof from two experts gave further context regarding Oxbow's SO_2 emissions and how Oxbow plans to avoid detection by the TCEQ monitor. 4 RR 123-158; 1 SUPP RR Exh. 25, 26.

29, 2018. On September 12, 2018, Judge Floyd signed the Turnover Order after signing Orders denying Oxbow's Motion to Transfer to Venue and Oxbow's Motion to Compel Arbitration. CR 422, 421, 434.

The Turnover Order enforced the Judgment which incorporated the Arbitration Award. The District Court concluded that the Arbitration Award determined that it was Oxbow's responsibility to control pollution and established that Oxbow is required to purchase and maintain pollution control equipment to ensure the continued operation of Oxbow's and PASE's connected facilities. CR 429-30. The Turnover Order provides:

> The Arbitration Award is clear: Oxbow's duties and obligations under the Heat Agreement were determined for the "Plant" and those duties included bearing the risk of installing and maintaining pollution control equipment that will *ensure* the Plant's operation [i.e., Oxbow's operation *and* PASE's operation] in accordance with Oxbow's air permits and any other applicable environmental laws. If Oxbow has or believes that it has an actual or potential pollution problem, Oxbow is required under the Judgment and Arbitration Award to address the problem. That has already been judicially determined. Shutting off the delivery of waste heat to PASE's boilers and keeping PASE from operating, selling steam, and generating Heat Payments that may be offset by PASE to collect its Judgment are not actions consistent with the terms of the Arbitration Award and Judgment, particularly when Oxbow continues to operate all of its kilns. CR 430.

The Turnover Order includes a discussion of the underlying facts and the operative statute, Section 31.002 Tex. Civ. Prac. & Rem. Code Ann. (the "Turnover Statute"). Judge Floyd concluded that the evidence established each element for

relief under the Turnover Statute: (1) PASE had a Final Judgment against Oxbow; (2) PASE has not been able to collect any of the Judgment; (3) Oxbow owns and controls property that is not exempt from attachment, execution, or seizure for the satisfaction of liabilities: its coke calcining plant located in Jefferson County, Texas (the "Calciner Facility"), and, in particular, the waste heat generated by the Calciner Facility that is to be delivered by Oxbow to PASE to be used to satisfy the Judgment; and (4) PASE was entitled to aid from the Court through injunction or other means in order to reach property to obtain satisfaction on the judgment. CR 423.

The Turnover Order also states, "The Court finds that it is proper and appropriate to aid PASE in the collection of its Judgment to ensure that the property owned and controlled by Oxbow, the waste heat asset generated from Oxbow's Kiln Nos. 3, 4, and 5, be applied in such a way that will allow PASE to recover its Judgment by receiving the asset, the waste heat, that Oxbow is to deliver to PASE's Boiler Nos. 3, 4, and 5." CR 430. Judge Floyd entered a post-judgment injunction to prevent Oxbow from diverting or limiting the waste heat that it was to deliver to PASE, and appointed Pat Zummo as a receiver with narrow duties to monitor Oxbow's compliance with the injunction and to submit periodic reports. CR 431-32.

The receiver appointed by Judge Floyd has a very limited function and the injunctive relief was very specific: Oxbow cannot discharge its waste heat through

its hot stacks and circumvent PASE's steam plant except under emergent circumstances or for maintenance, and the receiver shall monitor Oxbow's compliance. CR 432. Contrary to Oxbow's characterization, the Turnover Order does *not* require Oxbow to operate any particular kilns, to produce any specific tonnage or quality of calcined coke, to deliver any minimum quantity of waste heat to PASE, or to operate any of its kilns at all. It merely provides that if Oxbow chooses to operate its Kiln Nos. 3, 4, or 5, it must deliver waste heat from those operations to PASE which PASE will then use to generate steam revenues, eliminate the Heat Bank deficit, and recover its Judgment through offsets of Heat Payments that PASE would otherwise have to make to Oxbow under the HEA, as confirmed by the Arbitration Award and Judgment. CR 430-31. When the Judgment is recovered, the Court is to be advised so that that post-Judgment injunction can be terminated. CR 433.

IV. Judge Floyd found Oxbow's pollution-related "defense" to PASE's Turnover proceeding to be unpersuasive.

During the hearing, Oxbow made arguments through its counsel in support of a pollution control "defense;" however, no sworn testimony was offered by any Oxbow witness. Oxbow's counsel argued that Oxbow's decision to incrementally curtail, and finally terminate, the delivery of waste heat to PASE was due to Oxbow's SO_2 pollution concerns and supposed desire to avoid liability under the

One Hour NAAQS SO_2 standard. 2 RR 51-54, 75-76, 186-193. However, there was no evidence of any TCEQ enforcement action against Oxbow and no testimony of any action brought or imminent by Jefferson County as Oxbow's counsel suggested. To the contrary, the evidence established that Oxbow's SO_2 emission was not an agenda item at any Jefferson County Commissioner's Court meeting. 5 RR Exh. 24, p. 328-401.

Judge Floyd did not find Oxbow's arguments to be credible or persuasive in the Order:

> Relying upon various letters and communications introduced into evidence, Oxbow's counsel argued that Oxbow indefinitely suspended delivery of waste heat to PASE because of SO_2 pollution concerns involving the TCEQ's SO_2 monitor. Oxbow's position, expressed through letters the Court received into evidence and through the argument of its counsel, was that Oxbow faces a greater likelihood of registering an exceedance of SO_2 at the monitor and facing possible governmental or regulatory action at some point in the future if waste heat is delivered to PASE and then discharged through the Cold Stacks. Oxbow's counsel argued that if Oxbow only uses its Hot Stacks and does not deliver waste heat to PASE, Oxbow can avoid registering exceedances at the monitor and can keep Jefferson County in "attainment" under the NAAQS SO_2 standard.
>
> The Court does not find the explanations and suggested extrapolations of admitted evidence offered by Oxbow's counsel to be persuasive and, in any event, such arguments cannot overcome the language of the Arbitration Award and Judgment, or PASE's clear and convincing evidence on the matters herein. Oxbow produced no witness to testify at the hearing on any matters. Thus, no testimony was received during the hearing in support of Oxbow's contentions and the Court received no test data, SO_2 emission modeling, test results, or expert testimony of

> any kind from Oxbow to support Oxbow's contentions. It is clear that Oxbow's actions of shutting off delivery of waste heat to PASE's three boilers has forced PASE out of operation and, if allowed to continue, will keep PASE from ever being able to recover its Judgment. Notably, there was no evidence presented of Oxbow taking or planning to take any corrective actions to control SO_2 pollution and restore the delivery of waste heat to PASE. Moreover, Oxbow produced no evidence of litigation or any governmental or regulatory action being pending or imminent against Oxbow for its SO_2 emissions, and Oxbow produced no evidence that it received notice from the TCEQ, the Environmental Protection Agency, or any governmental authority that it was in violation of any presently existing law relating to SO_2 emissions. CR 427-28.

It was uncontroverted that the volume of SO_2 emissions by Oxbow was the same whether it discharged waste heat through its hot stacks or the cold stacks. CR 425; 2 RR 120; 3 RR 122-23. Oxbow's motivations and intentions were also addressed in the Order:

> The Court concludes that Oxbow intends to continue to try to avoid SO_2 exceedance readings at the TCEQ monitor for the balance of the three-year monitoring program by discharging its flue gas exclusively through its Hot Stacks. It necessarily follows that if PASE remains out of business, it will never collect its Judgment. Meanwhile, Oxbow's intentions are clear: Oxbow intends to remain in business, operate its four kilns at any level it chooses by discharging flue gas through its Hot Stacks, avoid having to purchase or maintain pollution control equipment to control SO_2 emissions, and keep PASE from generating steam revenues to have Heat Payments that PASE can offset to collect its Judgment. CR 428.

STANDARD OF REVIEW

The entry of the Turnover Order is subject to review under an abuse of discretion standard. The issuance of a Turnover Order, even if predicated on an erroneous conclusion of law, will not be reversed for abuse of discretion if the judgment is sustainable for any reason. *Beaumont Bank, N.A. v. Buller,* 806 S.W. 2d 223, 226 (Tex. 1991); *Holland v. Alker*, No. 01-05-00666-CV, 2006 Tex. App. LEXIS 3125 (Tex. App. Houston 1st Dist. April 20, 2006). Under the abuse of discretion standard, the court below can only be reversed for acting in an unreasonable or arbitrary manner. *See Downer v. Aquamarine Operators, Inc.,* 701 S.W. 2d 238 (Tex. 1985).

A court presented with a motion to compel arbitration must first determine whether a dispute exists that falls within the scope of the arbitration agreement. *See, G.T. Leach Builders, LLC v. Sapphire V.P., L.P.,* 458 S.W. 3d 502, 519-20 (Tex. 2015); *Venture Cotton Coop. v. Freeman,* 435 S.W. 3d 222, 227 (Tex. 2014). As stated by the Texas Supreme Court, "We review a trial court's order denying a motion to compel arbitration for abuse of discretion. *Henry v. Cash Biz, LP,* 551 S.W. 3d 111, 115 (Tex. 2018) (citing *In Re Labatt Food Serv., L.P.,* 279 S.W. 3d 640, 642-43 (Tex. 2009). The *Henry* Court stated, "We defer to the trial court's factual determinations if they are supported by evidence, but review its legal determinations *de novo*." *Id.* A "clear failure by the trial court to analyze or apply

the law correctly will constitute an abuse of discretion." *Walker v. Packer,* 827 S.W. 2d 833, 840 (Tex. 1992).

The starting point for determining Oxbow's Motion to Compel Arbitration is to determine whether PASE pled the basis for a "dispute," i.e. whether PASE asserted any claims or causes of actions that would invoke the arbitration provision in the HEA. None of the authorities cited by Oxbow in its Standard of Review discussion involved a post-Judgment Turnover Order proceeding. To the contrary, every case cited by Oxbow involved a lawsuit where the plaintiff was asserting new claims and causes of action against the defendant. PASE did not raise a "dispute" in its Application to trigger any analysis as to the applicability of an arbitration provision and no appellate court has held that a Turnover Statute proceeding to enforce a judgment must be pursued in arbitration.

SUMMARY OF ARGUMENT

The District Court properly denied Oxbow's Motion to Compel Arbitration since it was inapplicable to PASE's Turnover Statute Application. PASE did not assert, nor did the Turnover Order decide, any new claims or causes of action, nor did the Order resolve any new "dispute" or award new damages.

The 172nd District Court had subject matter jurisdiction and properly applied the Turnover Statute to aid PASE in the collection of its Judgment by granting injunctive relief and appointing a receiver to monitor Oxbow's compliance with the Order. There was no basis to force PASE to re-arbitrate the enforcement of its Judgment.

Oxbow's arguments against the Turnover Order are based upon gross mischaracterizations of the relief requested by and granted to PASE, repeated distortions of the record, and the misapplication of authorities that have no relevance to this Turnover Statute proceeding.

The granting of the Turnover Order was proper in all respects.

ARGUMENT

I. The Trial Court properly denied Oxbow's Motion to Compel Arbitration.

Oxbow goes to exhaustive lengths to try to turn PASE's post-Judgment enforcement proceeding into something that it is not-a dispute that the parties are required to arbitrate under the HEA. PASE filed its post-Judgment Application seeking relief under the Turnover Statute to collect its Judgment. Oxbow's waste heat is the non-exempt asset that PASE must receive to collect its Judgment. Oxbow is required to deliver that waste heat to PASE pursuant to the HEA which was fully interpreted in relevant part by the Panel in the Award confirmed in the Judgment.

Judge Floyd found the terms of the unambiguous Judgment/Award to be determinative, found Oxbow's arguments to be unpersuasive, and ruled that Oxbow should deliver the waste heat asset to PASE so that PASE can satisfy its Judgment. No new "dispute" was at issue in this Turnover proceeding and there are no causes of action or disputes in this proceeding to be litigated in arbitration. There is certainly no reason to re-arbitrate the collection of the Judgment from the first arbitration.

Having lost, Oxbow wants to avoid paying the Judgment by forcing PASE into an arbitration "do-over." Oxbow claims a "dispute" exists that must be arbitrated. PASE disagrees. The Judgment provides, "This Order and Final

Judgment renders the Award (the Arbitration Award) incorporated herewith *enforceable in the same manner as any other judgment or decree of the Court.* This Order resolves all claims in this case and is intended to be a final judgment." 5 RR Exh. 11.

Under the Texas Arbitration Act and the Federal Arbitration Act, a court presented with a motion to compel arbitration must first determine whether a dispute exists that falls within the scope of the arbitration agreement. *See, G.T. Leach Builders, LLC v. Sapphire V.P., L.P.*, 458 S.W. 3d 502, 519-20 (Tex. 2015); *Venture Cotton Coop. v. Freeman*, 435 S.W.3d 222, 227 (Tex. 2014). PASE's post-Judgment Application did not raise a "new" dispute under the HEA that must be arbitrated. CR 6-25. The parties had a dispute which was arbitrated in 2011 that resulted in a Judgment for PASE in 2015. All that remains is for PASE to collect its Judgment in accordance with the Award using the processes afforded under the law for the collection of judgments in Texas.

Oxbow's duties and obligations under the HEA were determined in the Judgment for the "Plant" and those duties included Oxbow's responsibility to bear the risk of installing and maintaining pollution control equipment so that both entities would remain in operation and in environmental compliance. 5 RR Exh. 11, p. 303. Oxbow cannot resurrect its arguments that Oxbow is not solely responsible

for the pollution it generates and, in any event, that cannot serve as a defense to the Turnover Order.

Under Oxbow's theory, all Oxbow has to do to avoid paying a Judgment is to "suspend" the delivery of waste heat, force PASE into another arbitration, and continue in this manner until PASE no longer exists or the HEA expires. Oxbow's actions and arguments, if allowed to stand, render the Judgment meaningless.

Oxbow offers an incredulous interpretation of the claims that were litigated in the arbitration, even claiming that it was PASE, rather than Oxbow, who sought to avoid responsibility for pollution control under the HEA. Oxbow states that "In that arbitration, PASE sought to avoid any environmental responsibility-including the attendant millions of dollars in equipment costs and potential environmental risk-and to require that Oxbow assume 100% of the cost of any pollution control efforts required at Oxbow's plant and PASE's Waste Heat Facility." Oxbow Brief p. 14-15 (citing 6 RR Exh. 3 at 14-15).

In reality, Oxbow initiated the arbitration and sued PASE claiming that "PASE has breached §5.2 [of the HEA] by installing and maintaining a defective pollution control system, including boiler stacks, that fails to achieve a level of particulate matter emissions compliant with applicable permits and laws, thus requiring Oxbow to forego delivery of waste heat to the steam facility and instead diverting the heat and gasses to the kiln stacks." 5 RR Exh. 10 at para 90, p. 28.

In the arbitration, Oxbow also pled Section 12 of the HEA claiming that "Oxbow has the right to suspend the provision of waste heat to the steam facility in the event Oxbow receives a notice of an alleged violation of law or similar notice from a government or authority." 5 RR Exh. 10, para 105 at p. 31. Still further, Oxbow alleged:

> Oxbow contends that the emissions from the boiler stacks in excess of permit levels or in violation of applicable law is due exclusively to PASE's failure to install a reliable and effective pollution control system in the steam facility, pursuant to its obligations under the Agreement. Thus, suspension of the delivery of waste heat to the steam facility caused by the issuance of a notice of violation or similar notice is attributable solely to PASE's breach of its contract obligations. PASE has contended that, despite PASE's duties under the Agreement to install an effective pollution control system in the steam facility, Oxbow somehow has the obligation to ensure that emissions meet permit requirements regardless of the ineffective—indeed, harmful—operations of the PASE MgO/multiclone system. PASE's contentions have no merit. 5 RR Exh. 10, para 107 at pgs. 31-32.

In the arbitration, Oxbow asked the Panel to interpret and determine the rights of the parties under the HEA with regard to pollution control, governmental and/or environmental regulatory actions relating to Oxbow's pollution, and the respective liabilities of the parties under the HEA for the cost of installing and maintaining an effective pollution control system, with Oxbow even asking the Panel to determine the rights of the parties under Section 12 of the HEA in the event of a suspension. 5 RR Exh. 10, para 108 at p. 32.

The Panel determined that PASE had no responsibility to install or maintain pollution control equipment or to pay Oxbow's cost of installation and maintenance of a pollution control system. 5 RR Exh. 11, p. 306-07. The Panel also declared that Oxbow was "contractually and legally responsible" for complying with its air permits and "bears the risk of installing and maintaining pollution control equipment" to ensure the operation of both facilities "in accordance with Oxbow's air permits and any other applicable environmental laws." 5 RR Exh. 11, p. 303.

The Award incorporated into the Judgment is clear. Oxbow has to install and maintain pollution control equipment to ensure the operation of its calcining plant and PASE's steam generation plant. Oxbow's arguments on page 16 of its Brief: (1) that the Panel made no determination as to any amount Oxbow was obligated to spend on pollution control; (2) that Oxbow is only required to use "Commercially Reasonable Efforts;" or (3) that the Panel did not specifically preclude Oxbow from suspending delivery of waste heat to comply with emissions regulations in the future, do not overcome the rulings of the Panel confirming Oxbow's duties to control pollution under the HEA.

The HEA is dispositive with regard to Oxbow's pollution control obligations. If Oxbow believes it has an SO_2 emission problem, Oxbow has to address it in a manner that keeps both facilities operating or Oxbow has to shut everything down, including its own plant. CR 430; 5 RR 297, p. 303. There was no new "dispute" to

be determined in arbitration relating to Oxbow's "right" to keep PASE from recovering its Judgment by stopping the delivery of waste heat to PASE for a supposed pollution concern. Judge Floyd did not need to make any new findings or decide any new "dispute." He simply acknowledged that the findings in the Award were dispositive and entered Orders to assist PASE with recovering its Judgment. CR 428-30. Judge Floyd's ruling was consistent with Texas law that applies collateral estoppel/res judicata principles to arbitration awards. *See Casa Del Mar Ass'n v. Gossen Livingston Assocs,* 434 S.W. 3d 211, 219 (Tex. App.-Houston [1st Dist.] 2014). (arbitration award is conclusive on parties as to all matters of fact and law submitted).

While PASE could indeed sue Oxbow someday for post-arbitration misconduct to recover post-arbitration damages, PASE has done no such thing in this Turnover proceeding. Oxbow cannot prevent the enforcement of PASE's Judgment under the Turnover Statute by arguing that PASE must litigate claims in arbitration that were not asserted in PASE's Application to seek damages that PASE did not seek to recover. There is no basis to require PASE to re-arbitrate the collection of its Judgment and no basis to overturn the denial of Oxbow's Motion to Compel Arbitration.

A. PASE's Turnover Statute Application did not assert new claims or causes of action arising out of or in connection with the HEA.

Oxbow has created a fiction that PASE filed a new lawsuit asking the 172nd District Court to conduct a "Merits Hearing" to litigate a "new dispute" that Oxbow contends had to be arbitrated under the HEA. PASE's Application did no such thing. The Application pled and supported a basis for the Court's jurisdiction; provided background facts about the HEA, the underlying Award, and Judgment; explained that Oxbow was diverting waste heat and keeping PASE from recovering its Judgment; described the TCEQ monitoring program; described the Turnover Statute and its purpose/terms; and requested relief from the Court under the Turnover Statute through an injunction and appointment of a receiver to assist PASE with recovering its Judgment, also asking for an award of attorney's fees per the statute. CR 23-24. The prayer for relief asked that "the Court enter such orders as necessary or appropriate under Texas law, including under the Turnover Statute, to aid [PASE] in the collection and recovery of its Judgment against [Oxbow]…" and asked that the orders remain effective "until such date as the Judgment in favor of PASE is satisfied in full through PASE's offset of Heat Payments." CR 23-24.

Nowhere within the post-Judgment Application did PASE assert "new" claims or causes of action against Oxbow or seek to recover damages based upon allegations of "new" misconduct by Oxbow. PASE only asked for relief under the Turnover Statute to recover its Judgment.

B. The Court's Turnover Order did not decide a new "dispute" or resolve any new cause of action.

PASE's Application invokes the Turnover Statute. CR 6-24. PASE demonstrated the applicability of the Turnover Statute and met its burden of proof to obtain the relief granted by Judge Floyd. On the other hand, Oxbow presented Judge Floyd with various arguments under the HEA based upon supposed pollution concerns that Oxbow argued kept it from having to deliver waste heat to PASE now, and presumably ever. 2 RR 51-54, 75-76, 186-193. After introducing argument and evidence to support its supposed defense to PASE's Turnover action based upon unsubstantiated pollution concerns, Oxbow now contends that Judge Floyd somehow exceeded his authority when he didn't find those arguments to be persuasive.

Meanwhile, Oxbow omits all discussion of the ultimate basis for the Turnover Order: that the Arbitration Award, incorporated into the Judgment, fully determined Oxbow's duties to control pollution and confirmed that Oxbow is required to purchase and maintain pollution control equipment to ensure the continued operation of Oxbow's and PASE's connected facilities, or shut down. The Turnover Order confirms this. It provides:

> The Court finds that the Arbitration Award and Judgment addressed Oxbow's duties under the Heat Agreement with regard to pollution control and are determinative with regard to this Turnover Statute proceeding. CR 428.

After discussing facts "central to the issues in this Turnover proceeding," Judge Floyd stated:

> The Arbitration Award is clear: Oxbow's duties and obligations under the Heat Agreement were determined for the "Plant" and those duties included bearing the risk of installing and maintaining pollution control equipment that will *ensure* the Plant's operation [i.e., Oxbow's operation *and* PASE's operation] in accordance with Oxbow's air permits and any other applicable environmental laws. If Oxbow has or believes that it has an actual or potential pollution problem, Oxbow is required under the Judgment and Arbitration Award to address the problem. That has already been judicially determined. CR 430.

After arguing that it was justified under the HEA to terminate all waste heat to PASE as a defense to PASE's Turnover Action, Oxbow should not be heard to complain that the Order reached conclusions, if not findings, that Oxbow's contentions were unpersuasive. However, ultimately, the Court reasoned that Oxbow's arguments were determined long ago against Oxbow by the Award/Judgment which precluded Oxbow's position that it could continue in business and operate all of its kilns, but shut only PASE down because of supposed pollution concerns. Even though Oxbow's counsel tried to get PASE's witnesses to admit there was a new "dispute," PASE only sought one remedy: to restore the delivery of waste heat so that PASE could recover its Judgment from operations. 3 RR 26-28.

The Arbitration Panel had the final say on how the HEA was to be interpreted and enforced with regard to the obligations of the parties to control pollution. Nevertheless, Oxbow tries to re-litigate the arbitration through references to arguments made by PASE's counsel before the Panel made its determinations in the Award (Oxbow Brief, p. 15, 36; 6 RR Exh. 3 at 14-16) and Oxbow asks the Court to consider positions taken during negotiation of the HEA in 2004-05. Oxbow Brief p. 15-16. Oxbow's arguments have no place in this proceeding. The Panel made its rulings, interpreted and enforced the HEA, and the Award was confirmed in the Judgment. Still, Judge Floyd did not find Oxbow's arguments to be persuasive and relied, instead, upon the language in the Award when he entered the Turnover Order. CR 427.

Contrary to Oxbow's assertion, the Turnover Order is not based on the Court concluding that Oxbow breached the HEA in 2017 or 2018. It is based upon the Court's recognition that Oxbow's duties under the HEA to pay for and provide pollution control were fully litigated and fully determined in the Award/Judgment, and PASE needed assistance with collecting that Judgment under the Turnover Statute.

C. PASE did not "agree" to arbitrate its Post-Judgment Turnover Action.

Oxbow incorrectly claims that PASE does not "deny" that the dispute pled and litigated in the Turnover proceeding was "whether the HEA's suspension provision authorized Oxbow's 2017 and 2018 suspensions of waste heat delivery to PASE, and whether the HEA's 'Commercially Reasonable Efforts' obligation required Oxbow to send an estimated $56 million to install, and an estimated $10 million per year to operate, new SO_2 pollution control equipment-arises out of or in connection with the HEA." PASE disagrees. While Oxbow's counsel argued and asked PASE's witnesses about those subjects, Judge Floyd did not determine whether the HEA's suspension provision authorized Oxbow's suspensions of waste heat delivery to PASE in 2017 or 2018, nor did he determine whether the HEA's "Commercially Reasonable Efforts" obligation required Oxbow to spend money to install or operate new SO_2 pollution control equipment. It follows that Oxbow's contention that "these uncontroverted facts alone are dispositive of Oxbow's motion to compel arbitration" has no merit.

On page 29 of its Brief, Oxbow argues that the HEA mandates that "every dispute of any kind or nature between the Parties arising out of or in connection with this [HEA] shall be submitted by either Party to binding arbitration," thus arguing that such language required PASE to arbitrate its Turnover proceeding because it supposedly had a "significant relationship to the HEA that brings it within the scope of the arbitration provision." Oxbow is wrong. PASE's Turnover Statute

Application related to the enforcement of PASE's existing Judgment. There is no right to arbitrate the method of enforcement of the Judgment.

D. Mere references in PASE's Turnover Statute Application to the HEA did not create a "Dispute" to be arbitrated.

On pages 30-31 of its Brief, Oxbow "cherry picks" four statements from PASE's Application and argues that by virtue of those statements in the Application, PASE "challenges Oxbow's performance under the HEA" and thus created a new dispute that was presented to Judge Floyd. The referenced statements gave background and context to the Application, but did not constitute the assertion of any claim or cause of action by PASE against Oxbow. Moreover, these statements did not take away from the reality that PASE only sought to collect its Judgment against Oxbow through relief provided under the Turnover Statute. Interestingly, two of the four statements quoted by Oxbow specifically referenced the relief sought by PASE, i.e., to recover its Judgment (Oxbow was "keeping PASE from recovering its Judgment" and "PASE needs the aid of this Court to recover its Judgment pursuant to the Turnover Statute"). Oxbow Brief p. 31 (citing excerpts at CR 15-16).

Oxbow pulled four contextual statements from PASE's Application to argue that "the 'dispute' here involves (1) whether the HEA's suspension provision permitted Oxbow's 2017 and 2018 suspensions of waste heat delivery, and (2)

whether Oxbow's obligations under the HEA to use "Commercially Reasonable Efforts" to maximize waste heat delivery and to operate its plant in accordance with 'Prudent Operating Practice' require Oxbow to (a) operate its plant in a manner that it believes will lead to non-attainment of the SO_2 NAAQS and potential violations of laws and permits applicable to the Port Arthur facility or (b) spend tens of millions of dollars installing and tens of millions more operating pollution control equipment." Oxbow Brief p. 31. In reality, to the extent those supposed "disputes" were argued in the hearing, they were presented through Oxbow's counsel in argument and/or through cross-examination of PASE's witnesses. Ultimately however, Judge Floyd did not determine any of these supposed "disputes," nor were they relevant to the relief granted in the Turnover Order which, as the Order provides, was based upon the language of the Award incorporated into the Judgment. CR 428-29.

E. PASE's "actions" did not invoke arbitration.

Oxbow claims that "PASE specifically invoked the arbitration provision *for this very dispute*." Oxbow Brief p. 32 (citing 6 RR Exh. 8). Oxbow then argues that by giving "Notice of Failure" under the HEA of Oxbow's "interruption and suspension of waste heat delivery" and "failures to perform material obligations," that PASE somehow "admitted that those allegations" constitute a "Dispute" within the scope of the arbitration provision that governs this proceeding. Oxbow Brief p.

32. Oxbow's argument is disassociated from the specific Turnover Statute relief asserted in PASE's Application and ignores the relief granted in the Turnover Order. While PASE has been damaged by Oxbow's interruption of waste heat delivery and gave Oxbow written notice in 2017 of Oxbow's breach of the HEA, PASE did not sue Oxbow to recover those damages in this Turnover proceeding. Oxbow cannot avoid enforcement under the Turnover Statute by forcing PASE to arbitrate claims and causes of action that PASE did not assert.

F. PASE did not "admit" that PASE pled an arbitral dispute.

Oxbow contorts the testimony of PASE representative Ray Deyoe on pages 32-33 of its Brief to imply that PASE admitted that its claim was "arbitrable." Oxbow quotes a question and answer in which Mr. Deyoe responded, "We could," when asked if "You could go to arbitration to say the suspension that was done for Kilns 3 and 4 and for Kiln 5 was wrong, right? Oxbow Brief p. 33; 3 RR 122; 3-6. Oxbow mischaracterized Deyoe's testimony to try to support its flawed position. In reality, Mr. Deyoe testified that PASE was in this proceeding to recover its Judgment. Oxbow knows that PASE only pled and argued for post judgment relief under the Turnover Statute which is exactly (and only) what Judge Floyd granted under the Turnover Order. PASE's witness testified with integrity. He recognized that PASE may indeed have a claim that it could assert someday for damages caused by

Oxbow's 2017-18 conduct, but this proceeding was not where that was occurring. 2 RR 239-41; 3 RR 26-28.

G. PASE did not fail to meet its burden to defeat arbitration.

Oxbow argues that PASE "never challenged the enforceability of the HEA's arbitration provision or its reach" and thus "the trial court had no authority to hear the dispute but instead was obligated to compel arbitration." Oxbow Brief p. 33. Oxbow's argument is preposterous. PASE filed briefs and argued against the applicability of the HEA's arbitration provision to its post-Judgment Turnover Statute proceeding. *See generally* 2 RR 56-75, 80-83; CR 220-249. Whether the HEA's arbitration provision would be "enforceable" if applied in a proper context was not at issue because: (1) PASE was not asserting a new claim or cause of action against Oxbow and did not ask Judge Floyd to decide any new "dispute;" and (2) PASE merely sought the Court's assistance with collecting its existing Judgment that resulted from the arbitration that already occurred. Oxbow did not cite, and cannot cite, a case that requires a judgment creditor to re-arbitrate the collection of a judgment that resulted from an arbitration. Oxbow's argument makes no sense.

H. Oxbow's contention that the "current dispute" was not litigated in or decided by the 2010-2011 arbitration is flawed and irrelevant.

Oxbow advances various arguments to try to demonstrate that there was a "new dispute" arising from Oxbow's 2017-2018 "suspensions" of waste heat to

PASE and that PASE's claims relating to those suspensions "could not and did not arise until 2016 and 2017-years after the 2011 Arbitration Award." Oxbow Brief p. 34. Oxbow then quotes various "court papers," arguments of PASE's counsel, and testimony from PASE's witnesses that supposedly distinguish PASE's claims that were asserted in the 2011 arbitration from the claims that Oxbow pretends PASE to be asserting in this Turnover Statute proceeding. However, Oxbow's argument ignores that: (1) PASE did not assert any claims or causes of action against Oxbow or seek to recover any damages based upon Oxbow's breach of the HEA between 2016 and 2018; and (2) no such claims or causes of action were decided in the Turnover Order.

Oxbow references pre-Award arguments of PASE's counsel in the arbitration about how counsel suggested that Section 12 of the HEA, the Suspension section, should be interpreted. Oxbow Brief p. 36 (citing 6 RR Exh. 3 at 15 and 2 RR 198-200). Such documents were admitted into evidence over PASE's objections. 2 RR 198-202. Counsel for Oxbow also tried to impeach PASE's witness with a transcript of an opening statement of PASE's counsel from the arbitration over PASE's objections. 2 RR 196-200. Those efforts, ultimately, carried no weight because the Panel entered its own decision interpreting and enforcing the HEA in its Award, particularly with regard to Oxbow's pollution control obligations, as discussed in multiple places in this Response.

Oxbow repeatedly argued that under the HEA, it is only required to use "Commercially Reasonable Efforts to maximize the production and delivery of waste heat to PASE" which Oxbow claims did not require Oxbow "to expend unlimited amounts of money, but only such amounts as are commercially reasonable in the applicable circumstances." Oxbow Brief p. 37. Oxbow's argument is incorrect because it conflates unrelated duties. Oxbow's duty to use Commercially Reasonable Efforts to maximize the delivery and production of waste heat to PASE has nothing to do with Oxbow's absolute duty, as set forth in the Award, to install and maintain pollution control equipment to meet its air permits and all environmental laws so that Oxbow and PASE will both remain operational. Oxbow is certainly breaching its contractual duty to use Commercially Reasonable Efforts to maximize its delivery of waste heat to PASE, but that was not a claim presented to or decided by Judge Floyd in the Order.

Similarly, Oxbow argues that by mentioning Oxbow's duty of good faith and fair dealing under the HEA in the Application that PASE somehow *sued* Oxbow for "breach of the duty of good faith and fair dealing" and created "a new dispute." Again, Oxbow insists upon distorting PASE's Application. PASE did not assert a claim for breach of good faith and fair dealing and no such claim was decided in the Turnover Order.

I. PASE did not label a "lawsuit" as a Turnover proceeding.

Oxbow claims that PASE surreptitiously "labeled" a new lawsuit as a Turnover proceeding. On pages 39-41 of its Brief, Oxbow argues that the HEA arbitration provision "makes no exception for post-judgment proceedings or for this kind of dispute." Oxbow cites an HEA provision that states "Neither party shall seek recourse to a court or other authorities to resolve a Dispute or to appeal for revisions to an arbitration decision." In actuality, PASE did neither. PASE did not seek to litigate the merits of Oxbow's 2017 and 2018 suspensions of waste heat delivery "under the guise of the Turnover Statute," nor did PASE appeal from an arbitration decision. PASE sought to enforce its Judgment and the Turnover Order was entered based upon the language of the Award, incorporated into the Judgment.

Oxbow argues that no prior appellate court has used the Turnover Statute "to enforce a non-money judgment," but ignores that while the language of the award/judgment is atypical, PASE, nevertheless, has a Judgment to recover a specified sum of monetary damages that was "enforceable in the same manner as any other judgment or decree of the Court." Simply because the Judgment required PASE to recover its damages from Oxbow's continued delivery of waste heat does not render PASE's Judgment unenforceable, nor does it require re-arbitration of PASE's efforts to enforce that Judgment through the Turnover Statute.

J. The FAA and the HEA do not preempt use of the Turnover Statute.

On pages 41-43, Oxbow argues that PASE cannot avoid the arbitration provision in the HEA "because the FAA preempts any attempted use of the Turnover Statute to adjudicate the suspension dispute outside of arbitration." Contrary to Oxbow's argument, the FAA says nothing about a party's right to enforce an arbitration award that has been confirmed in a judgment through a Turnover Statute proceeding, and none of the authorities cited by Oxbow involve post-Judgment enforcement. Under Oxbow's argument, PASE would never be able to collect any judgment because it would be forced into a never-ending loop of arbitration and/or would be out of business and rendered unable to offset Heat Payments from the continued operation of its steam plant.

K. There was no basis to apply a presumption favoring arbitration.

On pages 43-45 of Oxbow's Brief, Oxbow argues that this Court must impose a presumption in favor of agreements to arbitrate and resolve any doubts about an agreement to arbitrate in favor of arbitration. The obvious flaw in Oxbow's argument is that the parties have already arbitrated and PASE won. The presumption of arbitration has no applicability when PASE did not assert a new claim or cause of action, did not seek to recover damages in the Turnover proceeding, and only sought to recover the damages awarded in the Judgment. No case requires a party to re-arbitrate enforcement of a judgment that was obtained through arbitration and no

case requires a Turnover Statute proceeding under such circumstances to be viewed as a new "claim" that invokes a presumption in favor of arbitration.

Oxbow also argues that AAA Rule R-7(a) requires the arbitrator to rule "as to the arbitrability of any claim or counterclaim." Rule R-7(a) is inapplicable. Moreover, the authorities cited by Oxbow are distinguishable because: (1) they involve interpretation of a provision in the underlying agreements that delegated "gateway issues of arbitrability" to the arbitrator to decide, thus preempting a court's role in this decision; and/or (2) they involved litigation of a new dispute in which claims/causes of action were asserted. Neither of those circumstances are present in this matter. The HEA does not delegate to an arbitrator the right to make a gateway decision as to arbitrability and, even if it did, such language would have no applicability to a post-judgment proceeding to enforce a judgment that confirmed an arbitration award.

In support of its gateway argument, Oxbow cites *Rent-A-Center Tex, L.P. v. Bell,* 2016 Tex. App. LEXIS 9358 (Tex. App-Beaumont, August 25, 2016, no pet.) and other cases for the principle that a broad contractual clause that "clearly and unmistakably" delegates gateway issues of arbitrability to the arbitrator is enforceable." *Rent-A-Center Tex., L.P.* at *7-9. What Oxbow ignores is that the HEA contains no such provision, thus Oxbow's position has no merit.

II. The Trial Court did not err by appointing a receiver to monitor Oxbow's compliance with post-judgment injunctive relief to allow PASE to enforce its Judgment.

A. The District Court had jurisdiction to enter the Order Granting Post-Judgment Turnover Relief.

i. The plain language of the Turnover Statute allows a Jefferson County District Court to enforce PASE's Judgment.

Oxbow argues as a "threshold matter," that the 172nd District Court lacked subject matter jurisdiction to enter the Turnover Order. Oxbow's argument is incorrect.

Subject matter jurisdiction concerns the kinds of controversies a court has the authority to resolve. *Davis v. Zoning Bd. of Adjustment,* 865 S.W. 2d 941, 942 (Tex. 1993). In most cases, subject matter jurisdiction is based on the amount in controversy. *Continental Coffee Prods. Co. v. Cazarez,* 937 S.W. 2d 444, 449 (Tex. 1996). A district court has jurisdiction over lawsuits in which the amount in controversy is $500 or more. Section 24.007 Tex. Gov't Code. The Texas Constitution provides, "District court jurisdiction consists of exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this

Constitution or other law on some other court, tribunal, or administrative body." Tex. Const. art. V, §8.

Applicable statutory construction principles are well established. As the Court noted in *In Re Akin Gump Strauss Hauer & Feld*:

> In construing a statute, our objective is to determine and give effect to the Legislature's intent. *See National Liab. & Fire Ins. Co. v. Allen,* 15 S.W. 3d 525, 527 (Tex. 2000). If possible, we must ascertain that intent from the language the Legislature used in the statute and not look to extraneous matters for an intent the statute does not state. *Id.* If the meaning of the statutory language is unambiguous, we adopt the interpretation supported by the plain meaning of the provision's words. *St. Luke's Episcopal Hosp. v. Agbor,* 952 S.W. 2d 503, 505 (Tex. 1997). We must not engage in forced or strained construction; instead, we must yield to the plain sense of the words the Legislature chose. *See Id.*

In Re Akin Gump Strauss Hauer & Feld, LLP, 252 S.W. 3d 480, 2008 Tex. App LEXIS 1329, *20; *see also, Iliff v. Iliff*, 339 S.W.3d 74, 79 (Tex. 2011) (in construing a statute, court's task is to give effect to Legislature's expressed intent). A court may consider the object sought to be obtained, circumstances under which the statute was enacted, and the consequences of a particular construction when construing statutes. TEX. GOV'T CODE § 311.023 (1), (2), (5); *McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex. 2003); *Atmos Energy Corp. v. Cities of Allen*, 353 S.W.3d 156, 160, 2011 Tex. LEXIS 870, *10-11, 55 Tex. Sup. J. 88.

With regard to PASE's Turnover Statute proceeding, PASE sought the Court's assistance with collecting a Judgment now valued at $5 million dollars. Any

district court in the State of Texas has subject matter jurisdiction to apply the Turnover Statute to assist a judgment creditor with enforcing a $5 million dollar judgment. The Turnover Statute does not state that a judgment creditor is entitled to aid exclusively from the trial court that rendered the judgment. Instead, the statute states that a judgment creditor is entitled to aid from "a" court of "appropriate jurisdiction." If the Legislature intended to provide exclusive jurisdiction in the trial court rendering the judgment, it could have done so by using clear statutory language similar to that in the Texas Family Code Ann. §9.101(a) "the court that rendered a final decree of divorce…retains continuing exclusive jurisdiction to render an enforceable qualified domestic relations order…" *Chavez v. McNeely*, 287 S.W.3d 840, 844 (Tex. App.—Houston [1st Dist.] 2009, no pet.)

The Turnover Statute gives a judgment creditor the option of seeking a court's assistance in the same proceeding or in an *independent proceeding*. The Turnover Statute was enacted to expand procedures by which diligent creditors could reach the property of their judgment debtors *Cross, Kieschnick & Co. v. Johnston*, 892 S.W.2d 435, 438 (Tex. App.-San Antonio 1994, no writ). Since the subject of the Turnover proceeding concerns PASE's request for injunctive relief and/or the appointment of a receiver in connection with Oxbow's calcining plant in Jefferson County, a district court was an appropriate court to hear this Application.

Several appellate opinions support PASE's position. In *In Re Abira Med. Labs., LLC,* the Fourteenth Court of Appeals considered the issue of subject matter jurisdiction under the Turnover Statute. *In Re Abira Med. Labs., LLC,* No. 14-17-00841-CV, 2018 Tex. App. LEXIS 1383 (Tex. App.-Houston [14th Dist.] Feb. 22, 2018, orig. proceeding). The Court ruled that a county court in Harris County with a $200,000.00 jurisdictional limit lacked subject matter jurisdiction to apply the Turnover Statute to help judgment creditors enforce a judgment obtained in an Illinois Court (domesticated in Tarrant County, Texas) and a judgment obtained in a Harris County district court, both of which were the basis for Turnover Statute relief sought in the county court. The *In Re Abira* Court cited *Colorado Cnty. v. Staff,* 510 S.W. 3d 435, 444 (Tex. 2017) for the applicable statutory construction principle: "When construing a statute, our primary objective is to give effect to the Legislature's intent…We may not look beyond its language for assistance in determining legislative intent unless the statutory text is susceptible to more than one reasonable interpretation." *Id.* at *11. The *In Re Abira* Court ruled that the county court had no subject matter jurisdiction because both judgments were for amounts well in excess of $200,000.00; however, the Court considered the plain language of the Turnover Statute and stated that both judgment creditors could file their Turnover action proceedings in a district court and did not require the judgment

creditors to return to their respective trial courts to obtain relief under the Turnover Statute. *Id.* at *6-12, fn 4.

Similarly, in *Ramirez v. Orozco,* 2005 Tex. App. LEXIS 7888 (Tex. App-San Antonio [4th Dist.] September 28, 2005), the Court ruled that the 150th Judicial District Court of Bexar County had jurisdiction under the Turnover Statute to consider orders to assist the judgment creditor with recovering a judgment that was obtained in Bexar County Court at Law No. 2. *Id.* at *4-5.

Under a plain reading of the Turnover Statute, as supported by the referenced cases, Oxbow's contention that the 172nd District Court lacked subject matter jurisdiction is incorrect.

ii. The authorities cited by Oxbow do not support Oxbow's arguments that the District Court lacked subject matter jurisdiction.

The authorities cited in Oxbow's Brief have no bearing on the jurisdiction of the 172nd District Court to consider PASE's Turnover Statute proceeding. For example, Oxbow cites *In Re Abira Med. Labs., LLC, supra,* in support of its argument that the 172nd District Court did not have subject matter jurisdiction to enter the Turnover Order. As discussed above, *In Re Abira* supports PASE's position because the intervenors were *not* directed to return to the district courts where they obtained or domesticated their respective judgments in order to seek

Turnover Statute relief, but were, instead, informed that they "may pursue their own turnover proceeding in a district court" which had subject matter jurisdiction for the higher judgment amounts. *Id.* at *12.

Oxbow also cites *Cobb v. Thurmond,* 899 S.W. 2d 18, 19-20 (Tex. App.-San Antonio 1995, writ denied) as supposedly supporting its position that no court other than a trial court can have "jurisdiction over the matter." *Cobb* has no relevance to Oxbow's jurisdictional argument relating to the Turnover Statute. In *Cobb,* a San Antonio Court of Appeals considered two turnover orders that were signed by the District Court within a four month period. The Court of Appeals issued contemporaneous opinions, the first of which affirmed the original turnover order. Since the first turnover order was already on appeal when the second turnover order was entered, the Court of Appeals ruled that the trial court was without authority to enter the second turnover order. *Id.* at 19-20.

Similarly, Oxbow cites *Ex Parte Gonzalez,* 238 S.W. 635, 636 (Tex. 1922) for its contention that "the only court with subject matter jurisdiction to enforce a Texas judgment is the Texas court that rendered the judgment." Oxbow Brief p. 47. Again, Oxbow makes a broad statement of law that is not supported by the cited authority. In *Ex Parte Gonzalez,* the Supreme Court ruled in 1922 that the district court to which a case was transferred did not have "jurisdiction to punish the relator as for contempt for acts in violation of the injunction issued by the [transferring]

district court, committed prior to the transfer of the case." *Id.* at 636. *Ex Parte Gonzalez* had nothing to do with the Turnover Statute which had not been enacted, nor did it stand for Oxbow's argument that the only court with subject matter jurisdiction to enforce a Texas judgment is the court that rendered that judgment.

Oxbow also cites *Spencer v. Spencer,* 371 S.W. 2d 898 (Tex. Civ. App.-San Antonio 1963, no writ) for its dicta statement that "It is well settled that a court rendering judgment has exclusive jurisdiction for the purpose of enforcing its prior decree;" however, Oxbow ignores that *Spencer* was an appeal from a plea of privilege in a child custody dispute involving the determination of where proper venue would lie for a change of custody determination. *Id. Spencer* has no relevance to PASE's Turnover proceeding.

Oxbow also cites *In Re Akin Gump Strauss Hauer & Feld, LLP* for the premise that "disputes regarding the interpretation, meaning, and enforcement of a judgment rendered by a Texas trial court are resolved by the presiding judge of the trial court that rendered the judgment." Oxbow Brief p. 47. At issue in *In Re Akin Gump* was whether a trial court could remand issues to the arbitration panel after the court confirmed the arbitration award and rendered final judgment thereon under circumstances where neither side argued that the award was ambiguous or incomplete. *Id.* at *27. *In Re Akin Gump* has no application to Oxbow's subject matter jurisdiction argument in this Turnover Statute proceeding. Likewise,

Oxbow's reference to *Woody K. Lesikar Special Trust v. Moon,* No. 14-10-00119-CV, 2011 WL 3447491 (Tex. App.-Houston [14th Dist.] August 9, 2011, pet. denied), as an *accord* to *In Re Akin Gump,* is not relevant to Oxbow's jurisdictional challenge. If anything, *Woody* supports Plaintiff's position because the Court noted that the Turnover Statute "allows a party who has secured a final judgment to collect the judgment through a separate court proceeding." *Id.* at *11-12.

B. The Texas Turnover Statute authorizes the relief granted in the Order Granting Post-Judgment Turnover Relief and should be enforced as written.

i. The District Court was authorized to appoint a receiver to monitor compliance with the Court's post-judgment injunction order.

On pages 49-53 of Oxbow's Brief, Oxbow argues that the Turnover Order exceeded relief authorized under the Turnover Statute in two ways. Oxbow argues that it improperly disposed of a contested substantive dispute between the parties and that it "appointed a receiver with powers not authorized by the Turnover Statute." PASE demonstrated above that the Turnover Order did not involve the determination of any new dispute or claim and, thus, the Turnover Order did not exceed the authority of the Turnover Statute. As for Oxbow's second argument, PASE relies upon the language of the Turnover Statute itself, together with the fact

that the receiver appointed by the Turnover Order was only directed to monitor compliance with the post-Judgment injunction orders and to make periodic reports. CR 432. It strains credibility for Oxbow to argue that the receiver was given "powers not authorized by the Turnover Statute."

The purpose of the Turnover Statute, as stated in the House and Senate Committee Reports, was to "put a reasonable remedy in the hands of a diligent judgment creditor, subject to supervision of the Court." *Barlow v. Lane*, 745 S.W.2d 451, 454 (Tex. App.-Waco1988); *see also*, *Associated Ready Mix, Inc. v. Douglas,* 843 S.W.2d 758, 763 (Tex. App.-Waco 1992, orig. proceeding).

Under the Turnover Statute, a judgment creditor is entitled to aid from a court of appropriate jurisdiction through injunction *or other means* in order to reach property to obtain satisfaction on the judgment. §31.002 Tex. Civ. Prac. & Rem. Code (emphasis added). Pursuant to §31.002(b), when granting turnover relief to a judgment creditor, a court may "*…otherwise apply the debtor's nonexempt property to the satisfaction of the judgment.*" §31.002(b) Tex. Civ. Prac. & Rem. Code (emphasis added).The Legislature adopted Section 32.001 to enable procedures to facilitate and aid collection of a judgment beyond the limits imposed by the predecessor statute. *See Cross, Kieschnick & Co. v. Johnston*, 892 S.W.2d 435, 438 (Tex. App.--San Antonio 1994, no writ) (citing David Hittner, *Texas Post-judgment Turnover & Receivership Statutes*, 45 Tex. Bar J. 417, 417-18 (Apr. 1982) (citing

House and Senate committee reports)). Section 31.002, as a remedial statute, is to be liberally construed with a view to effect its object and to promote justice. *See Haden v. Sacks,* 332 S.W. 3d 523, 530 (Tex. App.-Houston [1st Dist.] 2009); fn 6 (comparing Turnover Statute to Texas Solid Waste Disposal Act and noting general rule that Statute is to be given the most comprehensive and liberal construction possible in furtherance of its purpose: to aid a judgment creditor in the collection of its judgment).

Judge Floyd's appointment of a receiver was appropriate. Designating a receiver to take charge of an asset is a long-recognized equitable remedy under the Turnover Statute. *See, e.g., Newman v. Toy*, 926 S.W.2d 629, 631–632 (Tex. App.—Austin 1996, writ denied); *Schultz v. Cadle Co.*, 825 S.W.2d 151 (Tex. App.—Dallas 1992), writ denied per curiam, 852 S.W.2d 499 (Tex. 1993). A court's authority to aid a judgment creditor in the collection of a judgment through injunction or other means, coupled with a court's authority to appoint a receiver or otherwise apply property to the satisfaction of a judgment under §31.002, allows a court to order a judgment debtor to turn over property directly to a receiver or place property under the control of a receiver to aid in the enforcement of a judgment. *See Burns v. Miller, Hiersche, Martens, & Hayward, P.C.* 948 S.W.2d 317, 327 (Tex. App.—Dallas 1997, writ denied) (trial court did not err in ordering turnover of property to someone other than a sheriff or constable); *Holland v. Alker*, No. 01-05-00666-CV, 2006 Tex.

App. LEXIS 3125 (Tex. App. [Houston-1st Dist.] April 20, 2006) (court has authority to appoint receiver to take possession of nonexempt property).

A turnover and receivership order under Chapter 31 can be used to reach present or future rights to property to obtain satisfaction of a judgment. Tex. Civ. Prac. & Rem. Code §31.002(a). Under the Turnover Statute, courts may appoint a receiver to facilitate the collection of a judgment without that receiver having to sell the property to recognize proceeds. *See, e.g., Stanley v. Reef Secs., Inc.*, 314 S.W.3d 659 (Tex. App.—Dallas 2010, no pet.) (receiver appointed in furtherance of turnover order to monitor partnership distributions and effectuate a charging order); *Goodman v. Compass Bank*, No. 05-15-00812-CV, 2016 Tex. App. LEXIS 8338, 2016 WL 4142243, at *11 (Tex. App.—Dallas Aug. 3, 2016, no pet.) (mem. op.) (affirming order requiring turnover of property that included present and future rights to proceeds from limited partnerships, LLC, and other corporate entities); *Pajooh v. Royal W. Invs. LLC*, 518 S.W.3d 557, 2017 Tex. App. LEXIS 2759 (Tex. App. Houston [1st Dist.] Mar. 30, 2017, no pet.) (turnover and receivership order were appropriate for monitoring distributions and effectuating charging order in favor of the judgment debtor). A decision as to whether to appoint a receiver under the Turnover Statute falls within a court's discretion. *Holland v. Alker*, No. 01-05-00666-CV, 2006 Tex. App. LEXIS 3125 (Tex. App. [Houston-1st Dist.] April 20, 2006).

Contrary to Oxbow's characterization that a receiver was appointed with "sweeping powers" (Oxbow Brief p. 52), the receiver appointed in the Turnover Order has a very limited function. The receiver is to monitor compliance with the Order and make reports, duties consistent with the Turnover Statute. CR 432.

ii. The District Court did not abuse its discretion in determining that the Turnover Order would allow PASE to recover its Judgment.

Oxbow argues that PASE did not demonstrate that the Turnover Order would assist PASE in recovering its Judgment. Oxbow Brief p. 53. Oxbow refers to its cross-examination of PASE representative, Ted Boriack, but overlooks testimony from this witness that supported the Court's determination, specifically that the Heat Bank deficit can be restored and Heat Payments to Oxbow will be generated to apply to PASE's Judgment if Oxbow restores delivery of waste heat to PASE and delivers that heat in accordance with the HEA.

Boriack, an engineer, produced alternative Heat Bank models under the HEA. One of Boriack's models, Exhibit 16, was based upon a coke tonnage assumption provided to Boriack by Oxbow that Oxbow's representative stated was "something that could be done" and was "doable." 3 RR 136-37; 4 RR 43. This model was based upon 89% of the intended threshold tons of the HEA. It assumed a $3.25 per Btu gas price which Boriack stated was conservative. 2 RR 138. Performance under

Exhibit 16 would generate $230,000.00 per month in Heat Payments which would restore the Heat Bank deficit in under 1.5 years, allowing PASE to recover its Judgment from that point forward. 3 RR 138-39.

Boriack testified that "We can absolutely earn Heat Payments and make contributions to this Award." 4 RR 54. He confirmed that he has "done sufficient models to determine that recovery of all or part of that Judgment is possible" and his scenarios and assumptions were "reasonable and attainable." 4 RR 88. Boriack also "wholeheartedly disagreed" with the suggestion by Oxbow's counsel that there is no way for the Heat Bank to ever go positive so that PASE can recover its Judgment. 2 RR 134. Boriack testified that over time the $4 million deficit in the Heat Bank "can go to zero and the Heat Payments will be generated…It's very feasible." 4 RR 89-90. Judge Floyd was justified in concluding that the Turnover Order would assist PASE in recovering its Judgment and Oxbow offered no controverting witness.

On page 6 of its Brief, Oxbow claims that, "If Oxbow produces more than the 'Threshold Amount' of 43,675 tons of calcined coke per month, then it accumulates a credit in the heat bank. If Oxbow produces less than the Threshold Amount, it accumulates a deficit in the heat bank." Oxbow's statements are not accurate. Boriack explained how Heat Payments have been and can be made where coke tons produced were well below the 43,675 threshold, with Plaintiff's Exhibit 16 being an example. 2 RR 132-33;

Oxbow suggests that its failure to receive Heat Payments after 2011 was due to declining calcined coke markets and declining natural gas prices. Oxbow Brief p. 7. Oxbow ignores the testimony that Oxbow's failure to receive Heat Payments after the Award was due to Oxbow's operational decision to not maximize its delivery of waste heat to PASE at the contracted for temperatures (4 RR 83-84), and testimony that Oxbow's damper moves to divert waste heat negatively affected the Heat Bank. 2 RR 145-47; 152-53. Those decisions had nothing to do with the price of natural gas.

iii. Oxbow's argument that less onerous relief was sought and denied by the arbitration panel is irrelevant to the District Court's Turnover Order to assist PASE with collecting its Judgment.

Oxbow argues that because the Arbitration Panel supposedly denied "less onerous relief than PASE received" in the Turnover Order, the "Turnover Order appointing a receiver goes far beyond what PASE received in the Arbitration Award and Judgment." Oxbow Brief p. 57-58. Oxbow claims that since the Panel denied "declaratory or injunctive relief," this Court should deny the appointment of a receiver to be consistent with the original Judgment. Oxbow Brief, p. 57.

Oxbow states, "As PASE concedes, the trial court does not have the authority to change the HEA, the 2011 Arbitration Award, or the 2015 Judgment." Oxbow

Brief p. 57. Oxbow cites a sentence in PASE's Application and *Matz v. Bennion,* 961 S.W. 2d 445, 452 (Tex. App. Houston [1st Dist.] 1997, writ denied) for the principle that enforcement orders may not be inconsistent with the original judgment and must not materially change substantial adjudicated portions of the judgment. PASE does not dispute this principle. However, the Turnover Order is consistent with the Judgment and does nothing to materially change it. It simply enjoins Oxbow from refusing to deliver waste heat to PASE if Oxbow operates its kilns that are connected to PASE's boilers so that PASE can collect its Judgment in the manner specifically prescribed in that Judgment. It did not create or impose liability upon Oxbow "which the original Judgment had not" as Oxbow suggests in its Brief. The *Matz* opinion supports PASE's position. *Matz* at *18-19 (post-judgment orders enforce trial court's original judgment and do not constitute material change in substantial adjudicated portions of judgment; judgments confirming arbitration awards are enforced as any other judgment).

Oxbow also cites *Miga v. Jenson,* No. 02-11-00074-CV, 2012 Tex. App. LEXIS 1911 (Tex. App. Ft. Worth March 8, 2012, orig. proceeding); which supports PASE's position insofar as the Court ruled that an injunction under the Turnover Statute "does not change the judgment, but is merely a vehicle for its enforcement." *Id.* at *28. The *Miga* Court also stated, "This Court has authority to enjoin Miga from secreting or further dissipating assets pursuant to the Turnover Statute." *Id.* at

*17-18. Under any relevant analysis, the Turnover Order facilitated enforcement of PASE's Judgment. It was not inconsistent with the Judgment and it did not materially change any substantial adjudicated portions of that Judgment.

Oxbow's argument that appointing a receiver "goes far beyond what PASE received in the Arbitration Award and Judgment" misses the mark. Oxbow Brief p. 58. Oxbow claims that because the Arbitration Panel declined to enter joint operating practices in favor of reminding the parties to honor their good faith and fair dealing obligations to each other in the Award, it is somehow improper for the Court to enjoin Oxbow from diverting waste heat or appoint a monitoring receiver so PASE can satisfy its Judgment in the manner contemplated under the Judgment. Oxbow's arguments make no sense and its reliance on the cited authorities is misplaced. The receiver is simply in place to monitor Oxbow's compliance with the Turnover Order, not to takeover or operate Oxbow's plant.

C. The HEA did not waive PASE's right to enforce its existing Judgment that confirms the Arbitration Award.

On pages 60-61 of Oxbow's Brief, Oxbow argues that the appointment of a receiver violates the HEA because PASE supposedly "waived" its right to Turnover Relief in the HEA. To begin with, Oxbow's "waiver" argument, disingenuous as it may be, was not asserted at any time in the Turnover Statute hearing or in any argument to Judge Floyd; therefore, this argument is not proper to be asserted for

the first time on appeal. Nevertheless, Oxbow's proffered construction of the HEA on the issue of waiver lacks merit. The HEA does not mention, much less waive, either party's right to enforce a judgment entered by a court under the Turnover Statute.

Oxbow's "waiver" argument distorts the HEA's arbitration provision. Oxbow contends on page 60 of its Brief that the HEA precluded parties from "seeking recourse to a court or other authorities to resolve a Dispute or to appeal for revisions to an arbitration decision" and somehow this language "waived" the parties' right to enforce a judgment resulting from an arbitration decision. Oxbow then argues that the HEA "narrows the parties' right to seek injunctive relief to two situations-(1) to compel arbitration of a dispute, or (2) to enforce the HEA's confidentiality provision-neither of which applies here." Oxbow Brief p. 60-61. Neither argument applies. Section 14.3(g) of the HEA allows a party to commence an action in a court for the reasons stated, but it does not provide that a party "waives" its right to enforce a judgment that results from arbitration through relief granted under the Turnover Statute. Likewise, Oxbow's proffered construction is factually inapplicable as discussed in the previous sections.

Waiver is the intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right. *Tenneco, Inc. v. Enter. Prods. Co.*, 925 S.W. 2d 640, 643 (Tex. 1996). The elements of waiver are (1) an existing right,

benefit, or advantage held by a party, (2) the party's actual knowledge of its existence, and (3) the party's actual intent to relinquish the right or intentional conduct inconsistent with the right. *Ulico Cas. Co. v. Allied Pilots Ass'n,* 262 S.W. 3d 773, 778 (Tex. 2008). Oxbow's argument doesn't fit. PASE did not waive its right to enforce the Judgment through a Turnover Order by executing the HEA in 2005.

D. The Turnover Order imposed appropriate post-Judgment injunctive relief.

The injunctive relief to allow PASE to recover its Judgment was the primary relief sought and obtained by PASE, and it was consistent with the purpose of the Turnover Statute. The Order provides that: Oxbow cannot discharge its waste heat through its hot stacks and circumvent PASE's steam plant except under emergent circumstances or for maintenance, and the receiver shall monitor and report on Oxbow's compliance. CR 432. Notably, the Turnover Order does *not* require Oxbow to operate any particular kilns, to produce any specific tonnage or quality of calcined coke, to deliver any minimum quantity of waste heat to PASE, or to operate any of its kilns at all. The effect of the Turnover Order is simple and direct. If Oxbow chooses to operate its Kiln Nos. 3, 4, or 5, it must deliver its waste heat from those operations to PASE which PASE will then use to generate steam revenues, eliminate the Heat Bank deficit, and recover its Judgment through offsets of Heat

Payments. When the Judgment is recovered, the Court is to be advised so that that post-Judgment injunction can be terminated. CR 433.

Injunctive relief is appropriate to aid a judgment creditor in collecting its Judgment. Texas courts have the authority to enjoin judgment debtors under the Turnover Statute. Tex. Civ. Prac. & Rem. Code §31.002; *In the Guardianship of De Villarreal*, 2009 Tex. App. LEXIS 2249 at *14 (Tex. App.—Corpus Christi 2009, pet. denied). The typical requirements for injunction are not applicable to an injunction granted to enforce a final judgment. *Roosth v. Roosth*, 889 S.W.2d 445, 460 (Tex. App.--Houston [14th Dist.] 1994, writ denied), citing *Childre v. Great Southwest Life Ins. Co.,* 700 S.W.2d 284, 288 (Tex. App.--Dallas 1985, no writ).

In *Miga v. Jensen*, 2012 Tex. App. LEXIS 1911, 2012 WL 745329 (Tex. App.—Fort Worth 2012), the court entered an injunction that prohibited the judgment debtor from spending, depleting, secreting, or transferring $21,560,150.67 plus prejudgment interest—except in the ordinary course of business or for reasonable and necessary household and living expenses or reasonable and necessary attorneys' fees-until that amount is finally paid to the judgment creditor…" The *Miga* court concluded that the judgment creditor faced the threat of imminent and irreparable harm in that any further depletion of the judgment debtor's assets could further reduce the judgment creditor's recovery, with the judgment debtor being unable to make up such loss. *Id.* at *19. The *Miga* court considered, but rejected,

an argument that the Turnover Statute does not allow a court to enter a purely prohibitive injunction against a defendant to aid a judgment creditor in the collection of his judgment. *Id.* at *27-28.

The Turnover Order granted post-Judgment injunctive relief specifically designed to aid PASE with collecting its Judgment in the manner contemplated under that Judgment. It was proper and in full accord with the Turnover Statute.

III. Oxbow's Statement of Facts contains numerous misstatements.

In its Statement of Facts, Oxbow makes numerous 'factual" statements that are either inaccurate or misleading. A discussion of some of the more notable misstatements follows.

On page 4, Oxbow states, "the HEA does not detail how Oxbow must operate its plant," with Oxbow claiming that it is only obligated to act "in accordance with Prudent Operating Practice" as defined in the HEA. This statement is misleading and not relevant to this proceeding. With regard to a pollution issue, Oxbow has two choices: address the issue or shut everything down. Oxbow's pollution control duties are not subject to a Prudent Operating Practice limitation.

In its Statement of Facts, Oxbow cites Section 12 of the HEA as giving it the right to "suspend production and delivery of waste heat in certain circumstances." Oxbow Brief p. 5. Oxbow raised this "defense" to PASE's Turnover Statute proceeding, but it was unpersuasive and not relevant because the Award determined

Oxbow's pollution control responsibilities. Furthermore, Oxbow offered no testimony to support a position that it was "suspending" performance "to mitigate the potential harm or detriment" supposedly resulting from its receipt of a "Notice of Alleged Violation of Law" or any similar notice from any Government or Authority," nor did Oxbow offer any testimony of corrective action it was taking to mitigate or address any supposed potential material harm or detriment associated with its SO_2 emissions. In fact, it was uncontroverted that no corrective action had been or was being taken. 3 RR 91. The letter from Judge Branick was admitted improperly over PASE's objection. 6 RR Exh. 17. It was unauthenticated hearsay offered for the truth of the matter asserted, i.e., to infer that Jefferson County threatened to sue Oxbow for its SO_2 emissions. 3 RR 51, 60-61. In reality, that was not the case. PASE refuted Oxbow's characterization of Branick's letter by establishing that no agenda item involving Oxbow ever appeared on the County Commissioner's Court docket and that Jefferson County had not considered, much less voted upon, any supposed legal action against Oxbow relating to its SO_2 emissions. 5 RR Exh. 24.

On page 6 of its Statement of Facts, Oxbow states that "PASE paid Oxbow only $1.00 for the Waste Heat Facility in 2005," and then stated, "PASE does not pay Oxbow anything for the waste heat Oxbow delivers." Oxbow Brief p.6. Oxbow ignores that PASE paid $1.00 in the HEA because it paid $38.5 million to refurbish

and upgrade the steam plant assets (5 RR 301) and committed to pay 30% of its steam revenues in Heat Payments to Oxbow for the full term of the HEA. Section 6.2 and 6.3 of the HEA provide for the timing of PASE's payments to *purchase* waste heat and for transfer of title for the waste heat "sold and delivered to PASE." 5 RR Exh. 9, p. 40. Testimony established that PASE paid Oxbow approximately $34 million dollars for waste heat through 2011. 3 RR 130-31.

On page 9 of its Statement of Facts, Oxbow states, "PASE has conceded that it sole remedy against Oxbow is to withhold Heat Payments in accordance with the heat bank provision." PASE agrees that the Judgment and Award specify how PASE is to recover its Judgment from Heat Payment offsets (which requires Oxbow to continue to deliver waste heat and PASE to remain in operation), but denies that PASE "conceded" to a "sole remedy," especially if Oxbow intends to infer that relief under the Turnover Statute is precluded or that PASE is limited in the future from recovering damages if PASE choses to assert a new action against Oxbow.

On pages 9-10 of its Brief, Oxbow cites various federal regulations and EPA publications, included in the Brief as in Footnote 7, that were not provided to Judge Floyd or otherwise introduced into evidence during the hearing. PASE objects to Oxbow's attempt to introduce into the record for this appeal statutes, regulations, and/or publications relating to its SO_2 emissions that were not presented to Judge Floyd for his consideration during the hearing. Oxbow followed its discussion of

these materials with another discussion of a meeting that supposedly took place in August of 2016 between Oxbow and PASE representatives "to discuss SO_2 emissions and the EPA's revised SO_2 NAAQS." Oxbow then included a discussion of what was supposedly discussed in the meeting, attributing the discussion to "CR198." Oxbow's inclusion of this discussion was highly improper. CR198 is the Affidavit of Scott Stewart, a Vice President of the "Oxbow Carbon Group of Companies" which was attached to Oxbow's Motion to Transfer Venue. Scott Stewart did not testify at the Turnover Statue hearing and his Affidavit was not offered by Oxbow for any purpose therein. Nevertheless, Oxbow discretely and improperly includes a discussion of Mr. Stewart's "testimony" in support of its contention that there was a new "dispute" that had to be arbitrated.

Oxbow continues its objectionable practice on pages 11-12 of its Brief, again discreetly referring to Mr. Stewart's Affidavit in support of Oxbow supposedly agreeing to perform tests of SO_2 emissions and taking various actions with PASE, with Oxbow stating that Oxbow did testing "which began in 2017, consistently confirming that running waste heat through the cold stacks resulted in violations of the SO_2 NAAQS" even though no one actually testified in that manner at the hearing. Oxbow Brief p.11-12 (citing CR198-99). This Court of Appeals should disregard Oxbow's Statement of Fact references to "evidence" and/or "testimony" that was

never presented to or considered by Judge Floyd when he entered the Turnover Order.

This Court should recall that Oxbow delayed the hearing under the pretense that it needed its representatives, Scott Stewart and Dan Rosendale, to testify, but then brought neither of them as witnesses. PASE presumes that Oxbow wanted to avoid subjecting them to cross-examination about Oxbow's actual SO_2 emission testing, its SO_2 modeling, its communications with the TCEQ, and other matters relevant to Oxbow's "defense" to PASE's Turnover Statute proceeding. CR 367-68.

On page 13 of its Statement of Facts, Oxbow again included "evidence" that was not presented in the hearing and that is not part of the hearing record. Specifically, Oxbow discusses supposed "extensive settlement negotiations, including a mediation in Houston on April 17, 2018," and recites that the "parties' effort to resolve the Dispute were unsuccessful." For these statements, Oxbow cites its own counsel, Kevin Jacobs, who's Affidavit was attached to Oxbow's Emergency Motion to Quash the Hearing. Mr. Jacobs did not testify in the hearing that resulted in the Turnover Order, nor was his Affidavit presented to Judge Floyd for any purpose during that hearing. In fact, Mr. Jacobs' Affidavit does not reference him even being at the mediation described by Oxbow. Yet Oxbow slips in statements from Mr. Jacob's Affidavit as support for its "factual" assertions. A few sentences

later, on page 14, Oxbow states, "Oxbow ultimately determined that it could not continue using the cold stacks associated with Kiln 5 and remain in compliance with the SO_2 NAAQS." Oxbow Brief p.14. This statement was not supported by any reference to the record, nor could it be, because Oxbow did not produce any witness to testify about any of its testing or modeling regarding SO_2 compliance or any of its efforts to meet the SO_2 NAAQS. Oxbow's tactics of mischaracterization and its repeated inclusion in its Statement of Facts of testimony or evidence not properly presented in the hearing should not be mistaken for an actual defense to the Turnover Order and such tactics should not be rewarded by this Honorable Court.

CONCLUSION

For these reasons, PASE respectfully requests that this Court vacate or withdraw its Stay of the Turnover Order entered on September 12, 2018 and affirm that Turnover Order in all respects. PASE also requests that this Court affirm the Order Denying Oxbow's Motion to Compel Arbitration and enter such other orders or grant such further relief to which PASE may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Appellee's Brief was served upon the parties shown below via e-service on October 29, 2018.

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CERTIFICATE OF COMPLIANCE

This Brief complies with the typeface requirements of Texas Rule of Appellate Procedure 9.4(e) because it is a document generated on a computer in Microsoft Word using 14-point font, except for footnotes, which are no smaller than 12-point font. This Brief contains 14,979 words, excluding the parts exempted by Texas Rule of Appellate Procedure 9.4(i)(1). This Brief complies with the maximum length requirements of Texas Rule of Appellate Procedure 9.4(i)(2)(B).

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